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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No.

DAN M. WHITE and JOHN H. WHITE,
Petitioners,

v.

UNITED STATES OF AMERICA and
JOSEPH E. BROWN, UNITED STATES ATTORNEY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on February 8, 1952.

OPINIONS BELOW

The findings of fact and conclusion of law of the District Court (R. 177) are reported in 98 Fed. Supp. 895. The Opinion of the Court of Appeals (R. 204) is not yet reported.

JURISDICTION

The jurisdiction of the Supreme Court to review this case rests upon 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. May Revenue Agents who well know that taxpayers are attempting to come within the "voluntary disclosure" policy of the Treasury Department secure evidence from such taxpayers who believe they have secured immunity and then use such facts as evidence in criminal proceedings? Or is such procedure a violation of the taxpayers' rights under the Fourth and Fifth Amendments to the Constitution?

2. When Treasury Agents are seeking facts regarding income tax evasion, are they under any duty to warn taxpayers of their Constitutional rights against self-incrimination, and that anything they may say may be used against them in a criminal action?

3. Shall the evidence and information in the hands of representatives of the United States, obtained from the petitioners as outlined above, be suppressed and enjoined?

STATUTES INVOLVED

The pertinent statutory provisions are printed in Appendix A to this petition, pages 19-21.

STATEMENT OF THE CASE

1. Petitioners are half-brothers,[1] one of whom (Dan M. White) resides in New Orleans, Louisiana,[2] and the other (J. H. White) in Jackson, Mississippi.[3] Dan M. White is connected and has been during all times material hereto with the Industrial Finance & Thrift Corporation in New Orleans, which is engaged in the brokerage of loans from local finance companies over the southern states. Two of the local finance companies from which it accepts paper are the White System of Jackson, and Friendly Finance

[1] R. 29, 89.
[2] R. 28, 89.
[3] R. 29, 88.

Company, located in Jackson, Mississippi, and were the companies through which J. H. White transacted business.[4] Apart from the rediscount of paper of the two Jackson, Mississippi, companies with Industrial Finance & Thrift Corporation, there was no business connection between the Mississippi and New Orleans enterprises.[5]

2. Criminal complaints have been filed with the United States Commissioner in the Southern District of Mississippi, charging each of petitioners with evasion of their 1944 Federal income taxes.[6] Petitioners have each conceded for the sake of this proceeding that his original returns filed with the Collector of Internal Revenue at Jackson, Mississippi, for the years 1942, 1943, 1944, and 1945, were fraudulent.[7] Each of the petitioners filed amended returns for the calendar years 1942 to 1945, inclusive, in the circumstances set out separately as to each petitioner below, the amended returns being filed on dates as follows:

Dan M. White, Amended Returns
1942, filed between March 10 and 15, 1946.[8]
1943, filed April 1, 1946.[9]
1944, filed April 1, 1946.[10]
1945, filed May 29, 1946.[11]

John H. White, Amended Returns
1942, filed August, 1946.[12]
1943, filed early September, 1946.[13]
1944, filed September 6, 1946.[14]
1945, filed September 19, 1946.[15]

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[4] R. 90.
[5] R. 29-30, 90.
[6] R. 175.
[7] R. 53.
[8] R. 65, 62.
[9] R. 40.
[10] R. 40, Petitioners' Exh. 12, R. 170.
[11] R. 40, Petitioners' Exh. 16, R. 172.
[12] R. 98, *Cf.* 100, 93.
[13] R. 98, 113-114.
[14] R. 98, Petitioners' Exh. 19, R. 173.
[15] Petitioners' Exh. 21, R. 174.

3. For many years, the United States Treasury Department has maintained a policy of not recommending criminal prosecution of taxpayers who have wilfully made a fraudulent tax return in those cases where the taxpayer, before an investigation of his returns is under way, makes what the Treasury calls a "voluntary disclosure" to some revenue agent or officer of his fraudulent misstatement.[16] In 1946, this policy was known to the respective accountants in New Orleans and in Jackson, Mississippi, who prepared the amended returns for the taxpayers,[17] and by the agents of the Bureau of Internal Revenue who made an investigation of the returns of each of the petitioners.[18] Under date of August 21, 1945, the then Secretary of the United States Treasury, Hon. Fred M. Vinson, writing as guest columnist in Mr. Drew Pearson's syndicated column "Washington Merry-Go-Round", announced the purpose of the Treasury Department to increase its efforts in the detection of fraudulent evasion of income taxes, and with respect to the "voluntary disclosure" policy stated as follows:

> "The Commissioner of Internal Revenue does not recommend criminal prosecution in the case of any taxpayer who makes a voluntary disclosure of omission or other misstatement in his tax return or of failure to make a tax return. Monetary penalties may be imposed for a delinquency, for negligence and for fraud, but the man who makes a disclosure before an investigation is under way protects himself and his family from the stigma of a felony conviction. And there is nothing complicated about going to a Collector or other revenue officer and simply saying, 'there is something wrong with my return and I want to straighten it out.' "[19]

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[16] Edwin M. Jones, *Voluntary Disclosure Policy of the Treasury Department* (March, 1951), 6 Tax Law Rev. 329, 330, Note 1.

[17] John L. Lankston, C. P. A., R. 68, for Dan M. White; James W. Cocke, Jr., C. P. A., R. 111-112, 113, 114-115, for John H. White.

[18] Cuvillier, R. 131, 136-137; Matheny, R. 141, 146-147; Holt, R. 165-168.

[19] Petitioners' Exh. 1, Jackson Clarion Ledger of Tuesday, August 21, 1945.

This policy statement came to the attention of both petitioners.[20] The Treasury policy was further publicized in a release to the press under date of Friday, October 5, 1945,[21] which also came to the attention of petitioner Dan M. White.[22]

Separate Statement As to Petitioner Dan M. White

4. From 1942 and until the latter part of 1945, petitioner Dan M. White was involved in matrimonial disputes with his first wife[23] as a result of which he had disguised income on the books of the corporation with which he was connected, Industrial Finance & Thrift Corporation, for the purpose of preventing his former wife finding out his true income.[24] At the time in October, 1945, that a final agreement was reached with an agent of his former wife, petitioner Dan M. White commenced assembling information necessary to straighten out his accounts to enable him to file amended returns.[25] By the time the final executed copy of the property settlement and agreement[26] was received in February, 1946, he had information ready for a 1942 amended return and a good part of that required for 1943 and 1944.[27] At that time, he signed his amended 1942 return and issued a check for it dated about March 10 or 12, 1946, and left it with his office with instructions to mail it to the Collector in Jackson, Mississippi, before March 15, 1946. He understood that he had until three years following the filing of each return within which to file a voluntary amendment,[28] which understanding was shared by the Collector of Internal Revenue at Jackson,

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20 D. M. White, R. 31-32; John H. White, R. 90-92.
21 Petitioners' Exh. 2.
22 R. 62, 31.
23 R. 30-32, 51-52.
24 R. 31, 54-55.
25 Petitioner Dan M. White, R. 31-32, 59-60; Lankston, R. 75.
26 R. 32.
27 R. 32.
28 R. 32-33.

Mississippi.[29] Thereupon, in the middle of February, 1946, petitioner Dan M. White left for Arizona, on the advice of his physician,[30] where he remained until about March 20, 1946.[31] During the middle of March, 1946, petitioner Dan M. White corresponded with the Collector respecting the Collector's request that a 1943 return, in addition to that for 1942 already filed, be gotten in promptly apparently because of the effect of the Current Tax Payment Act.[32] At that time, the Collector at Jackson was informed in writing that petitioner Dan M. White would amend his return for 1943 as soon as he returned to New Orleans.[33]

5. Upon petitioner Dan M. White's return from Arizona, he employed a certified public accountant to assist him with his amended return by reason of his mistake in preparing and filing a 1942 return.[34] The certified public accountant reassured him that he would purchase immunity from prosecution by filing the amended returns.[35] Thereafter, the accountant prepared the amended returns, which were filed as set forth in Statement 2, above, from information supplied by petitioner Dan M. White.[36] The certified public accountant informed an Internal Revenue Agent who had commenced and then suspended an investigation of the books of Industrial Finance & Thrift Corporation (as set forth in Statement 6, below) that he was preparing amended returns and that petitioner Dan M. White was making voluntary disclosures of all income tax owed by him, and verified from the head of the Intelligence Unit in

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29 Petitioners' Exh. 5, letter of Eugene Fly, Collector of Internal Revenue, to Dan M. White, dated March 21, 1946, in which it is stated as follows:

> "* * * although you did have until March 15, 1947 to voluntarily file amended returns for 1942 and 1943, since the 1942 return has been filed and processed as stated above, you should file your amended 1943 return as soon as possible."

30 R. 33.

31 R. 36.

32 Petitioners' Exhs. 3, 4 and 5; R. 34-35, 36, 37.

33 R. 34; Petitioners' Exh. 4, Encl.

34 R. 36.

35 R. 68-69.

36 R. 73-74, 75, 79.

New Orleans that the "voluntary-disclosure policy" was still in effect.[37] At the time the amended returns were filed, the entire remaining tax shown thereby to be due, together with interest to the date of filing the amended return, was paid.[38] The amended returns correctly disclosed his tax liability.[39]

6. February 28, 1946, after petitioner Dan M. White had gone to Arizona, a revenue agent, Mr. Edwin T. Cuvillier, appeared at Industrial Finance & Thrift Corporation for the purpose of checking the income-tax return of that corporation for its fiscal year ending July 31, 1944.[40] His investigation continued until March 15, 1946, when he withdrew because of difficulties in getting sufficient information from the books without the assistance of petitioner Dan M. White.[41] He found it impossible to reconcile compensation to the corporate president (then petitioner Dan M. White) shown by the corporate return to amount to $60,000 with compensation by way of commissions aggregating some $92,000 which he ascertained from the books.[42] So far as petitioner Dan M. White is concerned, Agent Cuvillier did not determine whether petitioner Dan M. White had received any part of the $30,000-difference.[43] He did not know that petitioner Dan M. White had returned more than $88,000 on his original return as received from and through Industrial Finance & Thrift Corporation.[44] It was not until a few days after petitioner Dan M. White's amended returns except that for 1945 had been filed, that this agent requested that the taxpayer's amended returns be sent to him when filed.[45] Agent Cuvillier did

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37 R. 68, 71-72, 79-80.
38 R. 48-49.
39 R. 40.
40 R. 124.
41 R. 127.
42 R. 125-126.
43 R. 128.
44 R. 135-136; Petitioners' Exh. 11; R. 170.
45 R. 132-134; Government's Exh. 1; R. 134.

not have petitioner Dan M. White's return for investigation,[46] and without that return, it was impossible to say whether petitioner Dan M. White may have failed to return some of his income.[47] Industrial Finance & Thrift Corporation and petitioner Dan M. White had different taxable years, petitioner Dan M. White being on a calendar-year basis and the corporation on the basis of a fiscal year ending July 31 of each year.[48] The returns of both the corporation and petitioner Dan M. White for a part of the period involved in his amended returns had previously withstood investigation by revenue agents without raising any suspicion.[49] Agent Cuvillier was succeeded in the investigation by Internal Revenue Agent E. D. Matheny and Special Agent Harold Holt of the Intelligence Unit about May 1, 1946.[50]

7. Internal Revenue Agents Cuvillier and Matheny and Special Agent Holt of the Intelligence Unit were each informed of the fact that petitioner Dan M. White had made and was making a "voluntary disclosure".[51] The Agents

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46 R. 135, 125, 132.

47 R. 135, 138-139, 150, 155, 162. Note that Mr. Cuvillier was unable even to determine the status of the corporation's accounts and tax returns (R. 127), which would make it utterly impossible, of course, to reach any questions respecting the return of Dan M. White, which he neither had had assigned to him nor requested until after four of the amended returns had been filed (Note 45, this statement). And with different accounting period (Note 48, this statement), it is more than evident that he could not infer petitioner Dan M. White got additional income, let alone inferring on the basis of the inference that he also had not reported it. Further, if it were plain the corporation had paid petitioner Dan M. White more than shown on its return, why, even with the amended returns in their possession, were the agents so anxious to be assured "what we had to work with," and receiving the cooperation of the taxayers, his associates, and his accountant Mr. Lankston. (R. 142-143.)

48 R. 138, and Petitioners' Exhs. 10-14, inclusive.

49 R. 54, 56-57, 63, 64-65.

50 Matheny, R. 140; Holt, R. 156-157.

51 There is an outright conflict of testimony as to Agent Cuvillier's knowledge that Dan M. White was making a "voluntary disclosure"—a conflict which can be reconciled only as the statement above states the ultimate fact. In the first instance, Mr. Lankston informed Agent Cuvillier, prior to the time any of the amended returns were prepared and filed, of the fact that "we were filing amended returns and making voluntary disclosures of all income tax owed by Mr. Dan M. White, which would be paid with the filing of the return". (R. 71-72; *cf.* R. 79-80.) After the returns, except 1945, had been filed, Agent Cuvillier called at the office of Mr. Dan M. White and inquired

sought and obtained his cooperation and that of his accountant.[52] Petitioner Dan M. White and persons under and by his direction made available to the agents all books, records, documents and papers of Dan M. White personally and of Industrial Finance & Thrift Corporation of which he was president, including petitioner Dan M. White's cancelled checks, memoranda of insurance commissions received and paid, records of personal losses compiled, per-

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what his motive was in filing amended returns; petitioner Dan M. White told him "I wanted to clear up everything in the past as far as reporting omissions of income, and I was making a voluntary disclosure of all of the income that I had and knew about." (R. 39.) Agent Cuvillier agrees that he encountered Mr. Lankston on the street and that Mr. Lankston informed him that he had been called in to prepare amended returns for Dan M. White—but he testifies flatly that Mr. Lankston "said nothing about voluntary disclosure" (R. 130-131), although it is scarcely conceivable that the intention to file comprehensive amended returns which would involve a conflicting need for records of Industrial Finance & Thrift Corporation, also testified to by Agent Cuvillier (R. 130-131), could have been discussed without the reason for filing them being also a matter of discussion. Agent Cuvillier couples with his denial that he discussed voluntary disclosure with Mr. Lankston the statement that "as a matter of fact, about April 8 I went over to see Mr. White and asked him what prompted him to make amended returns. . . . The sole purpose of that question was to find out whether or not Mr. White was going along under the theory that he was making a voluntary disclosure; I wanted to dissuade his mind from that, but he didn't indicate that was the intention of making those returns. Had he, I would have told him I thought it was too late." (R. 131.) If this statement be taken at face value, at least Agent Cuvillier had the problem of voluntary disclosure on his mind; and it is logical to believe that the reason he had it in mind was that it actually was the subject of the earlier conference with Mr. Lankston, as that witness directly testifies. Agent Cuvillier testifies forthrightly (R. 136-137), that when he discussed the matter with Mr. Dan M. White about April 8, he had in mind that Mr. Dan M. White might be trying to make a voluntary disclosure but did nothing to warn him that any evidence or information he might give could be used against him.

Agent Matheny and Special Agent Holt were informed of the fact that petitioner Dan M. White considered he was making a "voluntary disclosure" since there is a memorandum in the file that Mr. Lankston in December [1946] discussed voluntary disclosure with Mr. Lambert, Mr. Holt's superior. (R. 166.) While admitting he might not remember any conversation as to voluntary disclosure with Mr. Lankston, Mr. [D. M.] White or Mr. Guillot (R. 166), Special Agent Holt (when refreshed, R. 167-168) recalled that it had been discussed with Mr. Lankston at the time his formal statement was taken (R. 167-168) and that it was possible that there had been some discussion during the time of the investigation which he did not now recall. *Id.* Note that Agent Matheny made the outright statement that the words "voluntary disclosure" were never used during the entire course of the examination as relates to Mr. Dan M. White (R. 146-147), a statement that may be misleading in the light of Mr. Lambert's memorandum in the file. (R. 166, 168.)

52 D. M. White, R. 41; Lankston, R. 72; Matheny, R. 142-143; Special Agent Holt, R. 159-160.

sonal contracts, statements and information as to the sources from which the statements to them could be proved or disproved.[53] The agents had probably 100 or more conferences with petitioner Dan M. White[54] during 1946, 1947, 1948, and until about the middle of 1949,[55] during which they asked him a great many questions, explanation of the records, and explanation of how he had disguised in his original returns.[56] Petitioner Dan M. White considered this audit of his amended returns to be part of his voluntary disclosure.[57] The agents were permitted to take some of the records from petitioner Dan M. White's office in order that they might be copied[58] and they did make copies or photostats of them which are still in the possession of the agents.[59] At the request of the agents that he do so "as an indication of his good faith," petitioner Dan M. White opened and disclosed the contents of his lockbox in Jackson, Mississippi.[60]

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53 Special Agent Holt, R. 160-161, states the matters were furnished to them by Mr. White or through his direction and concludes "whatever records we asked Mr. White for, he furnished to us." See also Petitioner D. M. White, R. 43.

54 Special Agent Holt, R. 161.

55 Petitioner D. M. White, R. 41-42.

56 R. 42; *cf.* Lankston, R. 71-74.

57 R. 43, and the following from R. 44: "I was making a full disclosure and wanted to proceed with the action on my part with all of the cooperation I might give to gain immunity, and I felt that was a part of the procedure, that I should cooperate."

58 R. 43-44.

59 Special Agent Holt, R. 161; Agent Matheny, R. 153-154.

60 Matheny, R. 146-147. There is a flat conflict of evidence on the issue whether petitioner Dan M. White was informed before, or only after, he had opened the box that he was not required to do so. Matheny, R. 147, " * * * and Mr. White was advised that he could not legally be compelled to open any lockbox, that if he did so it would be voluntary on his part and as an indication of his good faith. The box was opened." D. M. White, R. 47, "Q. Mr. White, were you informed by the examining agents that you were not required to open the lockbox for inspection? A. Not until Mr. Matheny had gone in there and acquired all of the information he desired. At that time, after he had closed the boxes up * * * he said, 'Much obliged, you didn't have to do this'; he didn't inform me before." If we assume that Agent Matheny's recital is accurate, it is only indicative of the usual course followed by the investigative officials in exploiting the known purpose of petitioner to show "good faith" in connection with the change of heart which had prompted the voluntary disclosure, and take further "voluntary" steps on the basis of the immunity so freely offered by the Treasury itself. Such conduct is

8. Throughout the entire dealings of three agents with Dan M. White and his accountant and employees or associates, they at no time informed him that anything he might say or any documents, explanation or sources to which he referred them or made available to them might be used against him in any way.[61] He was never informed that the agents or the Treasury Department were contemplating his criminal prosecution.[62] Between November 17, 1948 and February, 1949, a formal statement under oath was taken by Special Agent Holt and Agent Matheny from petitioner Dan M. White,[63] at which time they did inform him that he had a constitutional right to refuse to answer any questions that he felt might incriminate him,[64], though this did not lead him to believe that any statement would be used against him so far as his 1942 to 1945 original income-tax returns were concerned, since in complying with the Treasury policy and cooperating with the agents he understood he had gained immunity so far as those particular incriminating matters were concerned.[65] This warning, which was the only warning ever given to petitioner Dan M. White, came only after his returns had been filed and the agents had availed themselves of his cooperation set forth in Statement 7 hereof throughout the years 1946, 1947, and 1948, until the time the statement was taken.[66] The agents explained their desire to take formal statements under oath on the ground that they were "tying up the loose ends" at the conclusion of their investigation, and even then did not intimate that criminal proceedings as to the false returns were contemplated.[67]

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entirely consistent with other conduct of the agents in the investigation; thus, in the case of petitioner J. H. White they were "very friendly" (R. 94), and never intimated that he was being investigated with a criminal charge in view. (R. 95-96.)

61 R. 44-45; Cuvillier, R. 136.

62 R. 48.

63 R. 45-46.

64 R. 44.

65 R. 44-45.

66 R. 44-45.

67 R. 74-75.

Separate Statement As to Petitioner John H. White

9. Some time after learning of the Government's "voluntary disclosure" policy, petitioner J. H. White commenced gathering information necessary to amend his 1942-1945 returns in April, 1946. He turned over the matter to Mr. John Cadawalder, who had prepared a great many tax returns; but that individual suffered a heart attack. He sent word to Mr. J. W. Cocke, a certified public accountant working on the books of the Friendly Finance Company, that he wanted to employ him to do work for him; he talked with him in June and again in July; and he showed him the figures for the years 1942 to 1945.[68] Mr. Cocke advised him of the voluntary-disclosure policy and that it was advisable, if he had no reason to believe he was under investigation by the Bureau of Internal Revenue, to inform the Collector's office immediately of the intention to make good.[69] Thereupon, and before petitioner J. H. White had any reason to believe that he was under investigation with respect to his tax returns, he and his accountant saw the Assistant Collector of Internal Revenue for the District of Mississippi, Mr. Harrod Allen Nichols, and informed him of the omission of income and of their intention to file amended returns and comply with the voluntary-disclosure policy.[70]

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[68] R. 91-92.

[69] R. 91-92, 111-112, 112-113.

[70] Nichols, R. 106-109; and note that despite attempts to deprecate, by respondent's cross-examination, the disclosure was made, Mr. Nichols admits that they informed him there was going to be a "substantial amount" of unreported income in the amended returns. (R. 108.) Thus, too, according to his recollection, he states that there was only one return, that for 1943, mentioned so far as he could recall; but he admits that he does not recall exactly what was said. (R. 106-108). With a matter so serious, petitioner J. H. White, the individual concerned, of course has a clear recollection of the occasion, and that Mr. Nichols was informed of the fact that they were making a voluntary disclosure and was told that a considerable amount of income had been omitted from the earlier returns. (R. 91-92.) The occasion is also rather clearly recalled by the accountant, James William Cocke, Jr., C. P. A., as would be expected of a serious matter of the kind within his professional responsibility. He recalls informing Mr. Nichols that the matter was "of the most importance," and that there had been a "gross understatement of income tax for the years 1942 through 1945" and that it would take time for him to prepare the amended returns, which is why the matter was being

10. Petitioner J. H. White filed amended returns as set forth in Statement 2 hereof, and accurately reflected his income and his tax liability for the respective years.[71] With the returns, petitioner paid the entire remaining tax liability, together with interest, shown due by the returns.[72]

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brought to his attention at that time. (R. 111-112.) Unfortunately, Mr. Cocke kept no written memorandum of his visit with Mr. White to Mr. Nichols, the Assistant Collector. (R. 115.) This, he explains, was because "this was the first case of this type I had had and you might say I was somewhat green." (R. 116-117.)

It is apparent that the failure of Mr. Nichols to make a memorandum for the Treasury Department files (R. 109) has resulted in the recommendation of criminal prosecution in this case. For it is scarcely conceivable that with an official as high-ranking as Mr. Nichols having knowledge of the intention to amend the returns, the Treasury Department would stand foresworn on its "voluntary-disclosure" policy, however inclined mere investigative officers might be to make their job as easy as possible. At the same time, in justice to Mr. Nichols, it must be observed that the agents were informed of the call of Messrs. J. H. White and Cocke prior to the time they first started their investigation July 29, 1946 (R. 143, 157); for Mr. Matheny testified that on the first visit to Mr. J. H. White in Jackson on July 29, 1946, the agents "had received some information that Mr. Harold White was contemplating filing some amended returns" and directly asked if he was planning on filing amended returns (R. 141-142); and Special Agent Holt says much the same thing (R. 157). It is obvious from this record that the agents gained the information of the intended amendment of the returns of J. H. White for 1942, 1943, 1944 and 1945 (R. 157) either from petitioner J. H. White or his accountant Mr. Cocke on the one hand, or from Assistant Collector Nichols on the other. The inference from the fact that they possessed this information when they say they first commenced the investigation by contacting Mr. J. H. White on July 29, 1946, is that they must, therefore, have obtained the information from Assistant Collector Nichols. This confirms the direct testimony of petitioner J. H. White that the first time he saw Agent Matheny and Special Agent Holt was when they came in his office a short time before he filed his amended returns (R. 93-94) and that the taxpayer and his accountant had already been to the office of Assistant Collector Nichols before they came to his office (R. 100, 101, 102), which was when (July 29, 1946) they first commenced their investigation (R. 157). This conclusion of fact is strengthened by the fact that the agents did not have petitioner J. H. White's 1942 return (*Cf.* Matheny, R. 153) and asked Mr. J. H. White for it (R. 93-94), and the fact that petitioner J. H. White did not have it (R. 93, 98-99) and referred them to the individual who drew his original return for him, a Mr. Stanton (R. 93-94). Mr. Cocke, of course, had the taxpayer's retained copy of petitioner J. H. White's 1942 return; it was necessary for him to have it to prepare the amended returns, on which he was then engaged, and actually it was in his possession. (R. 121.) And the inference from the fact that petitioner J. H. White did not have the return when the agents called further confirms the fact that that return was not "lost" (as understood by respondent's counsel (R. 121-122)) merely because it was not in petitioner J. H. White's files, but had earlier been turned over to Mr. Cocke for preparation of amended returns.

[71] R. 90, 93, 115.

[72] R. 90.

After the initial call of Agent Matheny and Special Agent Holt in July or August, 1946,[73] they did not again contact him until the early part of 1947.[74] They continued with their investigation until the latter part of 1948.[75] Petitioner J. H. White and his accountant cooperated as well as they knew how, they supplied the agents with information, books, papers, records, explanations, made statements to them, and otherwise cooperated.[76]

11. The agents at no time warned petitioner J. H. White that anything he might say, or any records he might furnish, might be used against him.[77] They asked him on December 22, 1948, to make a formal statement and answers to their questions, under oath.[78] In that connection they informed him that he was not compelled to answer any questions he might think might incriminate him under any Federal statute.[79] But there was no other or further warning given to him, nor any warning given during the nearly two-and-one-half years they had the case under investigation prior thereto that any criminal prosecution was contemplated.[80]

Facts Regarding Prior Proceedings.

Petitioners filed Petitions and Motions to Suppress the Evidence thus obtained on the ground that it had been obtained by entrapment and in violation of the Fourth and Fifth Amendments to the Constitution of the United States. The District Court denied the Petitions and Motions and the Court of Appeals affirmed. The District Court was of the opinion that because Bureau Agents had begun an investigation of Industrial Finance and Thrift Corporation prior to the time that these two individuals made their voluntary disclosure, they did not come within the protec-

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73 This is covered by Note 70, Statement 9.
74 R. 94.
75 R. 94, 143.
76 R. 94-96, 114.
77 R. 96.
78 R. 96-97.
79 R. 97.
80 R. 97.

tion of the "voluntary disclosure" policy. The District Court cited as authority *United States* v. *Lustig*, 67 Fed. Supp. 306, aff'd. (C.A. 2) 163 F. 2d 85. In so doing, the District Court failed to point out that in the *Lustig* case the District Court (67 Fed. Supp. 306-309) stated that, on the very first occasion representatives of the taxpayers called upon the Special Agent:

> "• • • These representatives of the defendants and of the corporate taxpayers were then and there advised by the said Special Agent that the 'disclosure' was not made prior to investigation, and that an investigation had been underway for some weeks."

The District Court thought the case at bar was different from *In re Liebster*, (E.D. Pa. 1950) 91 Fed. Supp. 814, which petitioners contend squarely supports their position. The Government did not prosecute an appeal in the *Liebster* case.

The Court of Appeals, in affirming the District Court, likewise relied on the *Lustig* case and made no comment on the fact that in *Lustig* the taxpayers' representatives were advised at the outset that they did not come within the "voluntary disclosure" policy.

The complaint of the petitioners in the case at bar is that the Agents did not warn the Whites as was done in the *Lustig* case. Instead:

1. Revenue Agent Cuvillier testified that, early in the investigation and before he had requisitioned White's returns, he visited Dan M. White "solely" for the purpose of determining if White thought he was making a voluntary disclosure. Yet he completely failed to warn White, as had been done in the *Lustig* case.

2. The Special Agent's files contain a memorandum that the taxpayers believed they were making a voluntary disclosure.

3. An Assistant Collector testified that J. H. White and his accountant called upon him and stated that amended returns would be filed.

4. Despite all the foregoing, the Whites were led on to furnish the information to enable the Treasury to make out its case. It is the very type of behavior which this Court has repeatedly said is unconstitutional.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the Treasury Department may announce a policy of nonprosecution, lead people into a trap by believing in the honesty and good faith of the Treasury, and then use the evidence so obtained in a criminal prosecution.

2. In failing to hold that evidence obtained, as indicated in the preceding paragraph, should be suppressed.

3. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below is in conflict with decisions of this Court which hold that a confession, in order to be admissible, must be free and voluntary and must not have been obtained by any direct or implied promises, however slight. *Hopt* v. *Utah*, 110 U. S. 574, *Bram* v. *United States*, 168 U. S. 532.

2. The decision of the Court below is in conflict with the decisions of this Court which hold that where papers are secured by fraud and trickery, they can not be used in a criminal prosecution. *Weeks* v. *United States*, 232 U. S. 383, *Gouled* v. *United States*, 255 U. S. 298, *Nardone* v. *United States*, 308 U. S. 338.

3. The decision of the Court below is in conflict with the Federal Rules of Criminal Procedure, Rule 5 (b), re-

quiring that an accused person must be informed that anything he says may be used against him.

4. *United States* v. *Lustig,* 67 Fed. Supp. 306, aff'd. (C.A. 2) 163 F. 2d 85, is not authority for disposing of the present case because in the *Lustig* case the taxpayers were warned at the outset that they did not come within the "voluntary disclosure" policy. The complaint of the petitioners in the case at bar is that the Agents did not warn the Whites as was done in the *Lustig* case. Instead:

(a) Revenue Agent Cuvillier testified that, early in the investigation and before he had requisitioned White's returns, he visited Dan M. White "solely" for the purpose of determining if White thought he was making a voluntary disclosure. Yet he completely failed to warn White, as had been done in the *Lustig* case.

(b) The Special Agent's files contain a memorandum that the taxpayers believed they were making a voluntary disclosure.

(c) An Assistant Collector testified that J. H. White and his accountant called upon him and stated that amended returns would be filed.

(d) Despite all the foregoing, the Whites were led on to furnish the information to enable the Treasury to make out its case. It is the very type of behavior which this court has repeatedly said is unconstitutional.

5. The question is a matter of great public importance because of the established practice of the Treasury Department Special Agents of not warning a person being investigated with respect to his possible violation of the income tax law that he is under no duty to make any statements; that any statements he makes may be used against him; and that he has a Constitutional right to refuse to answer such questions. Such practice on the part of

Special Agents in the Bureau of Internal Revenue is contrary to the usual practice of other Federal investigative officers, including those of the Federal Bureau of Investigation.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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February 28, 1952.

APPENDIX A

Statutes Involved

Amendment 4 of the United States Constitution states as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment 5 of the United States Constitution states as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Rule 5 of the Federal Rules of Criminal Procedure (Title 18, U. S. C.) provides in Subsection (a) that the officer or person making an arrest "shall take the arrested person *without unnecessary delay* before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States." (Italics added.) The rule continues:

> "(b) *Statement by the Commissioner.* The commissioner shall inform the defendant of the complaint against him of his right to retain counsel and of his right to have a preliminary examination. He shall

also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules." [See also Rule 40(b) (2).]

Rule 41 provides as follows:

"Rule 41. *Search and Seizure*

* * * * * * *

"(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant. * * * The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

* * * * * * *

"(g) *Scope and Definition.* * * * The term 'property' is used in this rule to include documents, books, papers and any other tangible objects."

The Judicial Code, § 1651(a) provides as follows:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Section 3602 of the Internal Revenue Code provides as follows:

> "§3602. *Search Warrants*
>
> "The several judges of the district courts of the United States, and the United States commissioners, may, within their respective jurisdictions, issue a search warrant, authorizing any internal revenue officer to search any premises within the same, if such officer makes oath in writing that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of the said premises."

Section 145 of the Internal Revenue Code provides in part as follows:

> "(b) *Failure to Collect and Pay over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."